

EXHIBIT E

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October 23, 2022

Via Electronic Mail

Sandra Ketner
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690 Sierra Rose Drive
Reno, Nevada 89511
sketner@shjnevada.com

Re: Lucero Sanchez v. Renown Health; NERC #0112-18-0007R

Ms. Ketner:

First, thank you for reaching out to me regarding your (and possibly plaintiff's) intent to depose NERC investigator Richard Brown. Per our discussion on August 31, 2022, the following statutes and caselaw are mainly what NERC relies on to oppose deposition and/or trial subpoenas.

As you are aware, NRS 233.190 generally precludes providing any information on specific cases investigated by NERC. However, NERC may provide the information to the parties except: (1) information obtained during negotiations for a settlement or attempts at mediating or conciliating the complaint¹, (2) investigative notes or reports, and (3) information that may be used to identify a person² who provided information during the investigation and who has requested anonymity. NRS 233.190(4).

Further, pursuant to Fed.R.Civ.P. 45(d)(3)(A)(iii), the court out of which a subpoena is issued must quash or modify a subpoena that "requires disclosure of privileged or other protected matter." It is NERC's position that after the parties receive the non-confidential information in NERC's investigative file, any additional requests seek protected information under the deliberative process privilege. *See United States E.E.O.C. v. Pinal County*, 714 F. Supp. 2d 1073 (S.D. Cal. 2010). *Pinal County* indicates that it is the parties' burden to show that they are seeking information unrelated to the deliberative process.

You proposed that the scope of Investigator Brown's deposition would be limited to a factual inquiry and not impinge on the deliberative process. Again, it is NERC's position under *Pinal County* that merely deposing on factual matters does not overcome a motion to quash. The three cases cited in *Pinal County* and the case you provided, *Giezie v. Valley Health Sys., LLC*, Case No.

¹ This is the only involvement NERC Administrator Kara Jenkins has in any case.

² Witnesses in the case.

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2:12-cv-00036-ECR-GWF (D. Nev. Sep. 7, 2012), where the Court permitted the EEOC investigators to be deposed is distinguishable from these facts. Namely, those depositions were permitted to clarify illegible, ambiguous, or inconsistent information. However, “clarification and interpretation’ of the EEOC’s determination letter would undoubtedly require revealing information about the EEOC’s deliberative process, such as its analysis of the information obtained, its witness credibility evaluations, its evaluation of the evidence, the personal opinions of EEOC representatives, and the decision-making process of the EEOC. . . . As the EEOC observes, asking . . . any EEOC representative . . . to even set forth the selected facts which constitute the factual basis of the probable cause finding would infringe on the deliberative process privilege as it would reveal the EEOC’s evaluation and analysis of the extensive factual information gathered by the agency.” *Equal Emp’t Opportunity Comm’n v. Evans Fruit Co.*, NO. CV-10-3033-LRS, 5 (E.D. Wash. Feb. 10, 2012).

All non-confidential documents have been provided to the parties, which includes all the facts discovered during the investigation. I have attached the Order from the United States Court District of Nevada granting EEOC’s protective order preventing the deposition of EEOC employees. Although EEOC’s determination letter was not going to be introduced at trial, the Court still stated that even if it were relevant, deposing the employees would not provide any information “independent of the documents already provided.” Investigator Brown would only provide information that is duplicative and cumulative of information available in the investigative file. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). Additionally, it has been at least three years since Investigator Brown worked on this file and has investigated over a hundred other files since then. He doesn’t really have a recollection of this particular case.

In the event you determine to depose Investigator Brown, the Office of the Attorney General will accept service of his subpoena. I will also accept service by email. If possible, I would appreciate notice to provide me time to consult with NERC whether to file a motion to quash and/or protective order.

Thank you for your time and cooperation. Please let me know if you would like to discuss further.

Sincerely,

/s/ Sophia G. Long

Sophia G. Long

Senior Deputy Attorney General

ATTORNEY GENERAL’S OFFICE

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CLERK US DISTRICT COURT
DISTRICT OF NEVADA

BY A DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Plaintiff,

vs.

SUN CAB COMPANY, INC., d/b/a/
NELLIS CAB COMPANY,

Defendant.

CV-S-03-1230-KJD-(RJJ)

ORDER

This matter came before the undersigned Magistrate Judge on Defendants' Motion to Compel attendance at deposition (#13) and Plaintiff's Motion for Protective Order (#15). The Court has considered the Motion to Compel (#13), Plaintiff's Opposition (#14), Plaintiff's Motion (#15), Defendant's Reply and Opposition (#16) and Plaintiff's Reply.

Defendant seeks to depose three employees of Equal Employment Opportunity Commission (the Commission) including the District Director, regarding the Commission's investigation, decision and efforts of conciliation regarding claims of discrimination made against the Defendant. The Defendant contends that conciliation is relevant and discoverable as a good faith effort is a prerequisite to the jurisdiction of the Court. The Defendant seeks the factual predicate for the letter of determination in an attempt to counteract its value if admitted at trial.

The deposition of the employees will not be allowed regarding the investigation that led to the letter of determination being issued. The Commission has agreed not to introduce the

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1 Letter of Determination at trial, thus the investigation that led up to it is not relevant. Further
2 even if it were relevant, the Commission and the employees themselves admit that none of the
3 individuals subpoenaed have a personal recollection of the factual events that gave rise to
4 Commission filing suit in this case or the issuance of the letter of determination, which is
5 independent of the documents already provided. Decl. of Perry, Kite, Nelson, attached to
6 Motion for Protective Order (#15). Also, the Commission has agreed to redact the Investigator's
7 Memorandum and disclose all factual information to the Defendant. Reply at p. 2.

8 The Depositions will not be allowed regarding the efforts at conciliation as the degree of
9 conciliation is not a jurisdictional prerequisite. Although the Commission must make an effort to
10 conciliate prior to filing suit, the Ninth Circuit has not held the adequacy of the effort is
11 jurisdictional. E.E.O.C. v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982). Therefore,
12 evidence beyond that conciliation was attempted does not remove the power of the court to hear
13 the case. Further, none of the subpoenaed employees currently has an independent recollection
14 of the events. Decl. of Perry, Kite, Nelson, attached to Motion for Protective Order (#15).
15 Therefore, their testimony would be unlikely to lead to admissible information.

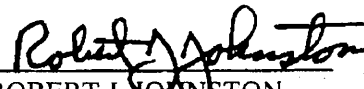
16 ORDER

17 Based on the foregoing and good cause appearing therefore,

18 IT IS HEREBY ORDERED Defendant's Motion to Compel (#13) is **DENIED**.

19 IT IS FURTHER ORDERED Plaintiff's Motion for Protective Order (#15) is **GRANTED**.

20 DATED this 14th day of June, 2004.

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23 ROBERT J. JOHNSTON
24 United States Magistrate Judge
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